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No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

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I. QUESTIONS PRESENTED.

A. Whether Nebraska's second motion to amend her petition presents a case or controversy that is appropriate for the Court's original jurisdiction; and

B. Whether amendment of Nebraska's petition to assert new claims is appropriate when pending cross-motions for summary judgment on the claims in the original petition may dispose of the claims in the amended petition.

II. STATEMENT OF THE CASE.

Nebraska's original petition to enforce her apportionment of the North Platte River under the existing Decree[1] was filed more than five years ago on October 6, 1986. The matter was referred to Special Master Owen Olpin on June 22, 1987. *Nebraska v. Wyoming,* 483 U.S. 1002 (1987). On September 11, 1987, Wyoming filed with the Special Master a motion for summary judgment addressing Nebraska's claims of Decree violation. While Wyoming's summary judgment motion was pending before the Special Master, Nebraska filed, and the Court denied, Nebraska's first motion to amend. *Nebraska v. Wyoming,* 485 U.S. 931 (1988). Nebraska's first amended petition would have sought modification of the Decree to provide a new apportionment for instream uses in Nebraska.

The Special Master later denied Wyoming's motion for summary judgment in order to allow for development of the facts. *See* First Interim Report of Special Master, accepted for filing by the Court June 26, 1989, 492 U.S. 903 (1989). Although Wyoming believes the Special Master erred in not recommending the granting of Wyoming's summary judgment motion, Wyoming did not seek leave to file exceptions to the First Interim Report because the Court had not invited such exceptions and because the Special Master had expressly left open the possibility of summary disposition of the pending claims following additional discovery and development of facts.

1. *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953). The earlier litigation in this case culminating in the 1945 opinion and decree at 325 U.S. 589 will sometimes be referred to in this brief as *"Nebraska v. Wyoming (I)."*

Following extensive discovery, the States of Wyoming, Colorado and Nebraska, as well as the United States, filed cross-motions for summary judgment which are now pending before the Special Master. Like Wyoming's first motion for summary judgment, the pending cross-motions seek interpretation of the existing Decree as a matter of law. Those cross-motions were argued before the Special Master in June, 1991. The parties are now awaiting a report and recommendation from the Special Master to the Court for disposition of those motions.

The issues of Decree interpretation raised by the pending summary judgment motions are:

(1) Whether the existing Decree limits Wyoming's use of the Laramie River;

(2) Whether Nebraska's apportionment under the Decree includes the right to curtail Wyoming uses in favor of Nebraska uses below Tri-State Dam;

(3) Whether municipal use of the proposed Deer Creek Reservoir is part of Wyoming's apportionment pursuant to Paragraph X of the Decree;

(4) Whether Nebraska has raised sufficient facts to meet her burden of proving that Deer Creek Reservoir would violate her apportionment under the Decree; and

(5) Whether the Decree apportioned to Nebraska a right to store natural flow in the Inland Lakes.

While responses to the summary judgment motions were being briefed before the Special Master, Nebraska filed a "Motion to Recommend an Apportionment of Non-

Irrigation Season Flows" with the Special Master. In that pleading, Nebraska requested "that the Special Master recommend to the Court, as part of his report and recommendations in regard to the pending cross-motions for summary judgment, that the unapportioned, non-irrigation season natural flows of the North Platte River be apportioned among the States of Nebraska, Wyoming, and Colorado." Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows at 6 (March 13, 1991). Nebraska accompanied that motion with neither a motion to amend her petition nor a new petition praying for such an apportionment of non-irrigation season flows. After briefing by the parties and *amici,* the Special Master denied that motion. Order of Special Master Owen Olpin, June 17, 1991.

III. STATEMENT OF FACTS.

Following unsuccessful attempts in the 1920's and early 1930's by Wyoming, Nebraska and Colorado to negotiate a compact apportioning the North Platte River, Nebraska brought suit in the Supreme Court in 1934 praying that "this court find and determine the equitable share of the waters of the North Platte River to which this complainant is entitled." Nebraska Bill of Complaint at 32-33, Article Fifteenth (October 1, 1934), *Nebraska v. Wyoming,* 325 U.S. 589 (1945). After 11 years of litigation, the Court was divided over the question of whether Nebraska had made out a case entitling her to *any* apportionment, much less the complete apportionment prayed for in the bill of complaint. *Id.,* 325 U.S. at 657 (J. Roberts, dissenting). The five-justice majority of the Court accepted the recommendation of Special Master Michael J. Doherty for an apportionment by means of limited injunctions. Those injunctions were tailored

to resolve the conflict arising in times of shortage among the particular irrigation uses presented by the states "by means of the imposition of a minimum of restriction." Report of Michael J. Doherty, Special Master at 122, *id.* ("Doherty Report").

Recognizing that Nebraska had proved no threat of injury except in years of very short water supply, Special Master Doherty recommended, and the Court adopted in Paragraph XIII of the Decree, a provision for retained jurisdiction to modify the Decree in response to changed conditions. The changed condition particularly contemplated by both Doherty and the Court was the "possibility of the passing of the present drouth cycle . . . which might justify the release of some or all of the restrictions . . ." in the Decree. Doherty Report at 10-11. *See also Nebraska v. Wyoming,* 325 U.S. 589, 620 (1945).

After reviewing extensive and conflicting evidence in which Nebraska claimed injury to uses all the way downstream to Grand Island on the Platte River, Special Master Doherty wrote:

> The conclusion is that Nebraska's claim for equitable apportionment of water originating above the Wyoming state line is in all events limited to the North Platte Project and State Line Canals and the lands supplied by them.[2]

Doherty Report at 96. The Court agreed with the Special Master:

2. "State Line Canals" is used to refer to the Farmers (Tri-State), Ramshorn, Mitchell, Gering and French Canals, all diverting near the state line at or above Tri-State Dam, except the now inactive Ramshorn Canal which diverted just below Tri-State Dam.

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Nebraska v. Wyoming, 325 U.S. 589, 628 (1945). *See also id.* at 654-55.

Based on extensive evidence, both Special Master Doherty and the Court made specific findings of the reasonable water requirements of those Nebraska uses diverting at and above Tri-State. Doherty Report at 53-87, 196-253; *Nebraska v. Wyoming*, 325 U.S. 589, 648-49 (1945). The injunctions recommended by Special Master Doherty and adopted by the Court in the Decree were intended to protect those specific uses.

Although the injunctions in the Decree that operate outside the irrigation season are not as extensive as those that operate during the irrigation season, river flows during the non-irrigation season are part of the apportionment under the existing Decree. The North Platte River non-irrigation season flows addressed in Nebraska's motion to amend consist of four components: (1) return flows below Tri-State Dam, (2) return flows and minor gains between Guernsey Dam and Tri-State Dam, (3) Laramie River contributions and (4) inflows from above Guernsey Dam. Each component either is already at issue in the present case or is not threatened even under the allegations in Nebraska's Amended Petition.

Return flows below Tri-State Dam are totally a function of Decree-apportioned diversions during the irrigation season. Therefore, resolution of the pending issues

of the extent of Nebraska's apportionment during the irrigation season will resolve any issue regarding return flows below Tri-State.[3] Return flows between Guernsey Dam and Tri-State Dam likewise are controlled by the irrigation season diversions. Moreover, any return flows accruing to the river in the non-irrigation season below Guernsey Dam will flow to Nebraska because Wyoming has neither the present ability nor any proposal to capture such flows for new uses. The Laramie River also flows into the North Platte River downstream of Guernsey Dam. As Wyoming explains *infra* at 20-23, the respective rights of the states to the Laramie River are presently at issue before the Special Master. The final component of winter flows — water from above Guernsey Dam — is expressly controlled by Paragraph III of the Decree which orders the priority of storage in the federal reservoirs on the North Platte.[4]

Development of the North Platte River in Wyoming has been limited since entry of the Decree. The only significant development of the North Platte River in Wyoming since entry of the Decree is already currently before the Court on Nebraska's pending petition challenging Grayrocks Reservoir and the proposed Deer Creek Reser-

3. The Director of the Nebraska Department of Water Resources admitted the self-evident proposition that protection of Nebraska's decreed apportionment for uses diverting at and above Tri-State Dam will automatically protect downstream uses of return flows from those Decree-apportioned uses. Deposition of J. Michael Jess, Vol. I at 109-10, 113-14 (November 28, 1989).
4. The only flows past Guernsey Dam that are not controlled by the existing Decree are the periodic surplus flows in excess of the water rights of the federal reservoirs. The right of proposed projects such as Deer Creek Reservoir to capture such surplus flows is presently at issue in the claims pending before the Special Master.

voir and Corn Creek Project.[5] Moreover, Wyoming has not yet used all the water apportioned to her under the Decree and the unused flows have reached Nebraska. In *Nebraska v. Wyoming (I),* it was determined that 60,000 acres would be irrigated under the Kendrick Project (Seminoe and Alcova Reservoirs), resulting in an irrigation season depletion (diversion minus returns) of 122,000 acre-feet and an annual depletion of 72,000 acre-feet. Doherty Report at 137-38; *Nebraska v. Wyoming,* 325 U.S. 589, 602 (1945). Wyoming has irrigated less than 24,250 acres under that project resulting in depletions of less than half of what was contemplated by the Court in 1945. In addition, Wyoming users have contracted for less than 5,000 acre-feet of the 15,000 acre-feet of Glendo Reservoir water apportioned to Wyoming under the 1953 stipulation for modification of the Decree. *Nebraska v. Wyoming,* 345 U.S. 981 (1953).

Since 1945, Nebraska's canals diverting in the Whalen to Tri-State Dam section of the river have diverted substantially in excess of the water requirements found by Special Master Doherty.[6] Nebraska's own records show that diversions in the Tri-State Dam to Bridgeport section of the river since 1945 also significantly exceeded the requirements found by Special Master Doherty for

5. Glendo Reservoir was built and has been operated pursuant to the 1953 stipulated amendment of the Decree, *Nebraska v. Wyoming,* 345 U.S. 981 (1953).
6. This fact is established without dispute in affidavits filed by both Nebraska and Wyoming with their motions for summary judgment. Affidavit of Bern S. Hinckley, Wyoming Second Motion for Summary Judgment (February 22, 1991); Affidavit of Ann S. Bleed, Nebraska Motion for Partial Summary Judgment (March 1, 1991).

those canals.[7] Furthermore, the water supply available for Lake McConaughy has exceeded the supply projected at the time of *Nebraska v. Wyoming (I).* Special Master Doherty concluded that uses below Lake McConaughy (Kingsley Dam) had no "equitable claim upon water from the upper states." Doherty Report at 99. In reaching that conclusion, he cited and relied on U.S. Exhibit Nos. 186 to 191, including U.S. Exhibit No. 189, a graph depicting the average annual flow from 1930 to 1940 at Martin, two miles above Kingsley Dam, of 1,049,000 acre-feet. Doherty Report at 96-99. Nebraska admits that the flow of the North Platte River available at Kingsley Dam since 1946 has averaged 1,105,000 acre-feet per year, 5% more than Special Master Doherty had determined was sufficient to meet the uses east of Kingsley. Amended Petition at 5, para. 12.[8]

Despite Nebraska's statement that "all water which currently flows into Nebraska is important to support minimum stream flows for the Platte River" (Nebraska Brief at 19), Nebraska sees no need to limit future depletions to the North Platte or Platte Rivers in Nebraska in order to preserve such instream flows. One study for Nebraska concluded that an additional 400,000 acre-feet of water could be developed under proposed projects such as the Prairie Bend and Landmark Projects from the central Platte and above, even after providing some level of minimum instream flows for wildlife habitat. A. Bleed,

7. Second Affidavit of Bern S. Hinckley, Figure 1, Wyoming Brief [before Special Master Olpin] in Opposition to Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows at 38 (April 5, 1991).
8. Nebraska's Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims and Nebraska's Brief in Support of that motion are cited herein as "Amended Petition" and "Nebraska Brief" respectively.

et al., University of Nebraska Conservation and Survey Division, *Economic, Environmental and Financing Optimization Analysis of Platte River Development Alternatives* (1986). Further, in 1986, the Nebraska Department of Water Resources issued a permit for diversion and transportation entirely out of the Platte River basin of about 125,000 acre-feet above the reach of the Platte River that Nebraska says is important to wildlife habitat. *See In re Application Nos. A-15145, A-15146, A-15147 and A-15148 Assigned to the Catherland Reclamation District* (Nebraska Department of Water Resources July 29, 1986), *set aside on other grounds, Catherland Reclamation District v. Lower Platte North Natural Resources District*, 230 Neb. 580, 433 N.W.2d 161 (1988).[9]

In 1984, Nebraska first enacted a statute providing for the appropriation of minimum instream flows in Nebraska for wildlife, environmental and recreational purposes. Neb. Rev. Stat. §§ 46-2,107 to 46-2,119 (1988 Reissue). However, it was not until 1990 that the State of Nebraska proceeded at the request of one of her political subdivisions to determine the need for an instream flow for the Platte River. That application is pending before the Nebraska Department of Water Resources. *In re Application Nos. A-17004 through A-17009 of the Central Platte Natural Resources District* (Nebraska Department of Water Resources filed July 25, 1990). *See* Nebraska Brief at 33-34.

9. Professor J. David Aiken of the University of Nebraska describes how serious depletion of groundwater from uncontrolled pumping for irrigation of 6.2 million acres in Nebraska has led to a number of proposals like Catherland to "rescue" irrigators from declining groundwater supplies. J. David Aiken, *New Directions in Nebraska Water Policy*, 66 NEB. L. REV. 8, 43-48 (1987).

At the same time, the Federal Energy Regulatory Commission ("FERC") is considering renewal of the hydroelectric licenses for Kingsley Dam and related power facilities.[10] The central issue in that proceeding is whether, and the extent to which, the renewed licenses ought to be conditioned on certain releases for the maintenance of instream flows for wildlife habitat. Of particular concern is whether certain minimum flows are required to avoid harming the designated critical habitat of the endangered whooping crane far downstream from Kingsley Dam on the Platte River. Various environmental groups have urged FERC to impose such conditions. The applicants for the renewed licenses, the Central Nebraska Public Power and Irrigation District ("CNPPID") and the Nebraska Public Power District ("NPPD") have challenged the biological necessity for such flows to maintain wildlife habitat. FERC is in the process of complet-

10. The Kingsley Dam relicensing process began in 1984 when the Central Nebraska Public Power and Irrigation District ("CNPPID") and the Nebraska Public Power District ("NPPD") filed relicensing applications pursuant to FERC regulations. *See* 18 C.F.R. § 16.3(a) (1991). FERC initially rejected the relicense applications for their failure to assess the impact of the projects on whooping crane habitat. *Central Nebraska Public Power and Irrigation District*, 39 FERC ¶ 61,378 at 62,222-23 and n.4 (1987). Since 1987, the projects have been operating under annual licenses pending the issuance of the permanent licenses. *See* 16 U.S.C. § 808(a) (1988). Studies are continuing concerning the need for wildlife protective conditions in the permanent licenses. *See, e.g., Central Nebraska Public Power and Irrigation District*, 43 FERC ¶ 61,225 at 61,580-81 (1988). The issue of the need for interim conditions in the annual licenses is presently on appeal for the second time before the D.C. Circuit Court of Appeals. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, No. 90-1397 (D.C. Cir. filed Aug. 3, 1990). *See also Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (cause remanded to FERC to determine whether substantial evidence existed to require interim conditions in annual licenses for maintenance of instream flows).

ing an environmental impact statement addressing the issue, among others, of whether conditions to maintain instream flows should be included in the permanent licenses of CNPPID and NPPD. FERC will not proceed with the license applications until the impact statement is completed.

Also on the federal level, the U.S. Bureau of Reclamation has begun consultation with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act to assess the impacts of the reclamation projects in Colorado, Wyoming and Nebraska on the North Platte and South Platte Rivers on endangered and threatened species habitat in the Platte River in central Nebraska. *See* Nebraska Brief at 35.

It is apparent throughout Nebraska's motion, amended petition and brief that the *possibility* that Lake McConaughy, the North Platte Project in Nebraska, or other proposed future projects in Nebraska might be required to maintain instream flows is the driving force behind Nebraska's present motion to amend, as it was behind the first such motion.

IV. SUMMARY OF ARGUMENT.

This is the second time that Nebraska has filed a motion to amend her petition while a summary judgment motion was pending. Nebraska's present motion is no more than an attempt to accomplish indirectly that which the Court denied her leave to do directly with the first motion to amend. Quite simply, Nebraska fears that in the future Kingsley Dam, the North Platte Project, or proposed Nebraska water projects on the Platte River will be required to maintain certain instream flows for

wildlife habitat in central Nebraska. In mere anticipation of such an outcome in pending federal and state administrative proceedings, Nebraska would ask the Court to reapportion the North Platte River by imposing new injunctions against present and future uses in Wyoming.

Principles of finality and certainty should compel the Court to deny Nebraska's attempt to upset the existing apportionment on the basis of the allegations in the Amended Petition. Furthermore, given the caution with which the Court exercises its original jurisdiction, the allegations in Nebraska's Amended Petition are too vague, indefinite and speculative to justify exercise of that jurisdiction.

To accept Nebraska's Amended Petition would be to engage the Court in factual litigation over the need for and quantification of instream flows for wildlife habitat in central Nebraska, the very issue the Court avoided in denying Nebraska's first motion to amend. The Court should not undertake such complex, factual litigation where, as here, the same issues are being addressed in other, more appropriate forums.

The states are in sharp disagreement over construction of the existing Decree and definition of the extent of Nebraska's apportionment under the Decree. The parties have spent considerable time and money preparing those Decree interpretation issues for resolution in the pending motions for summary judgment. Nebraska should not be permitted to avoid or postpone resolution of the pending issues by amending her petition. Those issues must be resolved before the Court considers entertaining any claim to modify, supplement or replace the apportionment under that Decree.

V. ARGUMENT.

A. The Supreme Court Exercises Its Original Jurisdiction With Extreme Caution and Only Where Absolutely Necessary.

This Court will not exercise the extraordinary power of its original jurisdiction to enjoin the activities of one sovereign state at the instance of another unless injury of a serious magnitude is shown by clear and convincing evidence. *Connecticut v. Massachusetts,* 282 U.S. 660 (1931); *Idaho v. Oregon,* 462 U.S. 1017 (1983); *New York v. New Jersey,* 256 U.S. 296, 309 (1921).

The caution with which the Court exercises its original jurisdiction serves two purposes. First is a recognition of the sovereign dignity of the states that come before it, particularly of the state that would be subject to the Court's injunction. *See Missouri v. Illinois,* 200 U.S. 496, 520-522 (1906); *New York v. New Jersey,* 256 U.S. 296 (1921). Second, and at least as important to the Court, is a recognition of the limits of this Court's docket and its reluctance to engage in complex and technical factual issues, particularly where those issues may be better resolved in another forum. *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). For both purposes, the Court has reserved "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Texas v. New Mexico,* 462 U.S. 554, 570 (1983).

As the Court said in *Alabama v. Arizona,* 291 U.S. 286, 291-292 (1934):

> [A] state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this Court with the action of a state. *Missouri v. Illinois,* 200 U.S. 496; *New York v. New Jersey,* 256 U.S. 296; *North Dakota v. Minnesota,* 263 U.S. 365. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent.[11]

Nebraska suggests that a well-pleaded complaint in the ordinary sense under the Federal Rules of Civil Procedure should be accepted by the Court as a matter of course. However, the Court is not constrained to merely analyze the sufficiency of the pleading in the same manner as a lower federal court would under FED.R.CIV.P. 12. Rather, the Court has discretion to decline cases that, although "well-pleaded," are otherwise inappropriate for its original jurisdiction. *See Arizona v. New Mexico,* 425 U.S. 794 (1976); *Massachusetts v. Missouri,* 308 U.S. 1 (1939).

The Court will not exercise its original jurisdiction over claims that involve only a future and speculative threat of injury. *New York v. Illinois,* 274 U.S. 488, 489

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11. Nebraska tries to distinguish *Alabama v. Arizona,* 291 U.S. 286 (1934), as having "no precedential effect on the clearly discernible impacts arising from the competition for interstate water." Nebraska Brief at 31, n.14. To the contrary, *Alabama v. Arizona* is on point precisely because Nebraska's Amended Petition identifies no clearly discernible impacts but only hypothetical and speculative allegations of injury that are not ripe for decision.

(1927) (dismissing a claim by New York for an injunction against the use of Great Lakes water that New York claimed would interfere with her use of the waters of the Niagara and St. Lawrence Rivers for power development, where the complaint did "not show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected"). *See also Arizona v. California,* 283 U.S. 423, 462 (1931) (dismissing bill of complaint "because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions"); *United States v. West Virginia,* 295 U.S. 463, 475 (1935) (mere assertion of a right to build a dam did not constitute an imminent threat to the government's control of navigation).

It is true that a controversy between states involving competing present or imminent uses of an overappropriated and water-short interstate stream is generally appropriate for the exercise of the Court's original jurisdiction. However, Nebraska fails to show that this is such a case. Rather, the Amended Petition alleges only potential conflicts that are not ripe for adjudication in the original jurisdiction.

B. Nebraska Has Not Alleged Any Present Injury From Wyoming Actions That Would Warrant Reopening the Existing Apportionment.

Nebraska's Amended Petition falls far short of alleging facts that, if proved, would establish any present injury to Nebraska's apportionment or other equitable interests. The Court wrote in 1945 that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming,* 325 U.S. 589, 628 (1945). Nebraska herself alleges that since 1946 she has received an abundant supply of such direct flow past Tri-State Dam, on the order of 150,000 acre-feet each irrigation season in excess of her entitlement under the existing apportionment. Nebraska Brief at 11.[12]

Although the Court made specific findings in 1945 concerning the reasonable water requirements of the Nebraska lands served by diversions between Whalen and Tri-State Dam, Nebraska does not dispute the fact that her canals have diverted far more than those requirements since 1945. Rather, she asserts now that she is entitled to the continued flow of such surpluses. Additionally, Nebraska's own allegations show that the supply available for Lake McConaughy has been substantially greater than the supply anticipated by Special Master Doherty. *See* Statement of Facts, *supra,* at 9.

In *Colorado v. Kansas,* 320 U.S. 383, 400 (1943), the second attempt by Kansas to convince the Court to limit Colorado's use of the Arkansas River was denied because

12. The "retrofit" of Tri-State Dam that Nebraska says threatens to cut off these flows was performed by one of Nebraska's own water users, the Farmers Irrigation District, in order to more efficiently use the supplies available at the dam. Nebraska's suggestion that the repair of Tri-State Dam will cut off the flows past Tri-State Dam is very misleading. The majority of such flows since 1946 occurred in the very wet years when large, uncontrollable surplus flows passed Tri-State Dam. In any event, in light of the Court's determination in 1945 that Nebraska was not entitled to *any* direct flow past Tri-State Dam, Nebraska has no ground to complain about improvements made for the sake of efficiency and better water management by one of her own water users.

Kansas failed to prove that Colorado had materially increased her depletions to the substantial injury of Kansas since the earlier litigation. Here, Nebraska, like Kansas, is back before the Court seeking new injunctions against the upstream state having once litigated the matter. However, in this case, the Court previously apportioned the river and Nebraska has not even *alleged* facts that would demonstrate increased depletions to the injury of Nebraska's equitable apportionment.

Nebraska characterizes Count I of the Amended Petition as a claim for apportionment of "previously unapportioned non-irrigation season flows" as if she were asking the Court to draw a new apportionment on a clean slate. But the slate is not clean. There is an existing Decree and an existing apportionment that was intended to describe all of Nebraska's rights to demand natural flow of the North Platte River from Wyoming. Nebraska now seeks to reapportion the North Platte by attempting to reopen that Decree to impose new injunctions on Wyoming which the Court previously found unnecessary. The importance of finality and certainty compels the Court to hold Nebraska to a high burden in seeking to reopen the Decree. *Arizona v. California*, 460 U.S. 605 (1983).

Nebraska urges the Court to exercise its retained jurisdiction under the Decree to consider "changed conditions" since entry of the Decree. However, she alleges neither changed conditions that threaten her apportionment under the existing Decree nor changed conditions that would justify a reapportionment to enlarge her share. The only changed condition is that Wyoming has not yet fully used her apportionment while Nebraska has received far more than her share of the river since 1945.

There is simply no reason for the Court to reopen the litigation to consider new and more limiting injunctions on Wyoming at this time. The Court should instead encourage expeditious resolution of the pending claims to enforce the existing apportionment.

C. Nebraska's Tendered Claim for an Apportionment of Non-Irrigation Season Flows is Too Vague and Indefinite to Admit of Adjudication in the Original Jurisdiction.

In Count I of the Amended Petition, Nebraska seeks a new or modified apportionment in effect to enjoin all new depletions in Wyoming during the non-irrigation season. However, neither the actions of Wyoming that Nebraska complains of nor the injury Nebraska fears are detailed sufficiently in the Amended Petition to meet the threshold showing of imminent and serious injury required to invoke this Court's original jurisdiction.

1. The Wyoming actions alleged in Nebraska's Amended Petition either are already being litigated before the Special Master or are too speculative and remote to warrant exercise of the Court's original jurisdiction.

Nebraska describes the Wyoming actions that she complains of in Count I of the Amended Petition as follows:

> The current and imminent actions of the State of Wyoming, including the *pending claims before the Court*, as well as Wyoming's *claimed but unspecified right to develop future uses*, infringe upon

> Nebraska's equitable share of the North Platte River during the non-irrigation season.

Amended Petition at 10, Count I, ¶ 37 (emphasis added).

"Pending claims before the Court" apparently is a reference to the pending summary judgment motions in which Wyoming argues that Nebraska's apportionment of water from Wyoming under the 1945 Decree was limited to the water found by the Court to be reasonably necessary for the uses supplied by diversions at and above Tri-State Dam.[13] Nebraska's Amended Petition alleges that the legal position advanced by Wyoming on that issue violates Nebraska's existing apportionment and threatens Nebraska's use of what she calls "unapportioned, non-irrigation season flows." Nebraska's apparent fear of an adverse ruling on the legal issues now pending before the Special Master is no ground for amending her petition at this time.

Likewise, Nebraska's complaint about "Wyoming's claimed but unspecified right to develop future uses" does not show an imminent threat that should move this Court to exercise its original jurisdiction. For example, with respect to the Laramie River, the only specific projects

13. Nebraska characterizes Wyoming's position as trying to limit Nebraska's diversions between Guernsey Dam and Tri-State Dam to "arbitrary" amounts. Amended Petition at 8, para. 24e. There is nothing arbitrary about Special Master Doherty's detailed findings of the water requirements that were made only after painstaking analysis of extensive evidence and were expressly approved by the Court. Doherty Report at 53-87, 196-253; *Nebraska v. Wyoming*, 325 U.S. 589, 648-49 (1945). Those very requirements that Nebraska characterizes as arbitrary were adopted in Paragraph IV of the Decree as fixed "diversion limitations in second feet and seasonal limitations in acre feet" for the Nebraska State Line Canals. *Id.*, 325 U.S. at 667.

that Nebraska identifies are Grayrocks Reservoir, which began operating in 1981, and the potential Corn Creek Project. Both projects are already at issue in the pending case. The pending summary judgment motions address the issue, among others, of whether, in the Grayrocks Settlement Agreement,[14] Nebraska gave up her right to argue that the use of Laramie River water by Grayrocks Reservoir or the Corn Creek Project violates her equitable apportionment. Again, allowing Nebraska's Amended Petition would only delay and prejudice resolution of those issues on the pending motions for summary judgment.

Beyond the allegations concerning Grayrocks Reservoir and the Corn Creek Project, Nebraska's only claim with respect to the Laramie River is that she is injured by Wyoming "claiming the right to dry up the Laramie River." Amended Petition at 7, para. 24b.[15] The pend-

14. The Grayrocks Settlement Agreement ended litigation in 1978 brought by Nebraska and several environmental groups to stop construction of Grayrocks Reservoir on the ground that the U.S. Army Corps of Engineers and the Rural Electrification Administration had violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b (1988 & Supp. I 1989) (current version), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. I 1989) (current version), in granting approvals for the project. *Nebraska v. Rural Elec. Admin.*, 12 E.R.C. 1156 (D. Neb. 1978), *appeal dismissed upon stipulation*, 594 F.2d 870 (8th Cir. 1979). Under that agreement, the operator of the reservoir, Basin Electric Power Cooperative, is obligated to maintain certain year-round minimum flows at the mouth of the Laramie River. The settlement agreement is reproduced at Appendix A-24 to A-32 of Wyoming Brief in Opposition to Motion for Leave to File Petition, December 17, 1986.

15. Although there is no threat "to dry up the Laramie River," Wyoming does believe her right to use Laramie River water is unrestricted under the plain language of this Court's decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *vacated and new decree issued*, 353 U.S. 953 (1957) ("the State of Wyo-

ing summary judgment motions again address the issue of whether the decrees in *Wyoming v. Colorado* and *Nebraska v. Wyoming (I)* effectively apportioned all the Laramie River to Colorado and Wyoming. Resolution of that issue could completely dispose of Nebraska's claim to the Laramie River.

Even if the Laramie River had not been fully apportioned between Colorado and Wyoming, Wyoming's claim to the Laramie would not raise a present dispute for resolution in the original jurisdiction. In *U.S. v. West Virginia,* 295 U.S. 463 (1935), the United States filed a bill of complaint taking issue with West Virginia's claim that she had the right and the power to construct a dam across the Ohio River notwithstanding the federal government's power over navigable waters. In dismissing the United States' bill of complaint, the Court said:

> The sovereign rights of the United States to control navigation are not invaded or even threatened by mere assertions . . . . The control of navigation by the United States may be threatened by the imminent construction of the dam, but not by permission to construct it.

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ming . . . shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado"). Although Nebraska raised and litigated a claim for apportionment of the Laramie River in *Nebraska v. Wyoming (I),* the Court recognized that the Laramie River had been previously apportioned between Colorado and Wyoming and declined to apportion any of the Laramie River to Nebraska, either in or out of the irrigation season. *Nebraska v. Wyoming,* 325 U.S. 589, 592 n.1 (1945). As Wyoming argues in her pending summary judgment motion, the principle of finality underlying the doctrine of *res judicata* precludes relitigation of Nebraska's claim to an apportionment of the Laramie River. *See Arizona v. California,* 460 U.S. 605, 625-26 (1983); *Wyoming v. Colorado,* 286 U.S. 494, 507 (1932).

295 U.S. at 475. *See also Arizona v. California,* 283 U.S. 423, 462-463 (1931) (failure to allege "definite physical acts by which [the defendant] is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions . . ." was cause for dismissal of Arizona's bill of complaint).

The other claims tendered by Nebraska in Count I of its Amended Petition likewise fall far short of raising issues that should move this Court to exercise its original jurisdiction. With respect to proposed construction on the tributaries between Pathfinder and Guernsey in Wyoming, it has been clearly shown that Deer Creek Reservoir is the only proposed project.[16] Again, the question of whether the construction and operation of Deer Creek Reservoir will violate the Decree or injure Nebraska's equitable apportionment under the Decree is before the Special Master on Wyoming's motion for summary judgment. Likewise, the question of whether Nebraska's decreed apportionment includes *any* right to store natu-

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16. In the Nebraska Brief, but not in her Amended Petition, Nebraska lists the names of what she terms "numerous water development projects in Wyoming." Nebraska Brief at 20. Without including any specific allegation in the Amended Petition, Nebraska suggests that the listed items constitute a significant threat of new depletions to the North Platte River. The suggestion is misleading. Many of the listed items are studies aimed at improving the efficiency of water use, including the importation of new sources into the North Platte basin. Others are old studies of potential projects that have been given no serious consideration since the 1960's or 1970's. Still others are projects for the improvement of municipal water delivery systems that have already been completed. It has been necessary for Wyoming and its water users to commit substantial funding toward improving the efficiency of use of the North Platte partly because the injunctions in the Decree restrict that use. In contrast, Nebraska has enjoyed abundant supplies since entry of the Decree and has committed little toward more efficient use of her available resources.

ral flow in the Inland Lakes without a Wyoming permit is also pending before the Special Master on the summary judgment motions. In short, the Wyoming actions that Nebraska complains of in Count I of the Amended Petition all are presently at issue in the pending claims before the Special Master or are too speculative and indefinite to warrant exercise of this Court's original jurisdiction.

2. The injury alleged by Nebraska is dependent on the outcome of disputes pending in other intrastate and federal forums.

Boiled down, Nebraska's claim for a new apportionment seeks to enjoin new Wyoming water uses in the North Platte basin because Nebraska fears that all the water presently crossing the state line might be needed in the future to satisfy uses that are competing with each other in Nebraska. The conflict between instream uses for wildlife habitat in the central Platte and upstream consumptive uses for irrigation and electric power generation in Nebraska is at the heart of Nebraska's injury claims.[17]

Nebraska points out that Kingsley Dam, which forms Lake McConaughy, is the "structure through which all

17. In this regard, Nebraska's agenda is identical to that of the environmental groups that have sought intervention in this case. Neither Nebraska nor those environmental groups are content to allow the question of the need for flows or a quantification of flows for instream wildlife purposes to take place in an appropriate forum before seeking further injunctions against Wyoming. Counsel for the Audubon Society described the strategy as to "Let [the water] all get downstream to Nebraska and then we'll worry about the details." June 7, 1991, Hearing Before Special Master on Summary Judgment, Transcript at 177.

subsequent downstream flows are controlled." Nebraska Brief at 10. The Federal Energy Regulatory Commission ("FERC") is presently considering applications to relicense the hydropower facilities associated with Kingsley Dam. (*See* Statement of Facts, *supra*, at 11-12.) Nebraska fears that the new licenses will be conditioned on minimum releases for the maintenance of instream flows at downstream wildlife habitat with a resulting reduction in the amount of water stored in Lake McConaughy and available for irrigation and power generation at Kingsley Dam and below. In anticipation of such a result, the Amended Petition would pray the Court to limit future use upstream in Wyoming.

In a related proceeding, the Central Platte Natural Resources District, a political subdivision of the State of Nebraska, seeks an instream flow water right under Nebraska law for the central Platte in the minimum amount necessary to maintain certain environmental values, including wildlife habitat. *In re Application Nos. A-17004 through A-17009 of the Central Platte Natural Resources District* (Nebraska Department of Water Resources filed July 25, 1990). Although the standard by which that application will be judged is the Nebraska statute, the factual issue of the biological necessity of minimum instream flows for wildlife habitat is likewise being adjudicated there.

The mere possibility of an outcome in those pending proceedings adverse to the interests of Lake McConaughy and its users cannot be the ground for invoking the Court's original jurisdiction, particularly where the Wyoming actions complained of are so uncertain. In *New York v. Illinois*, 274 U.S. 488, 489-490 (1927), the Court would not hear New York's complaint of injury to the possible

future use of the St. Lawrence River for hydropower purposes where such future use was uncertain and speculative. Likewise, Nebraska's claim of injury in mere anticipation of a certain outcome in the pending FERC proceeding and state water right proceeding does not merit the exercise of this Court's original jurisdiction. *See also Arizona v. California,* 283 U.S. 423, 463-64 (1931).

Wyoming agrees with Nebraska that this Court alone has the power to adjust its earlier apportionment of the North Platte River. However, until the various federal and intrastate proceedings involving instream flows for wildlife habitat have run their course, it is premature to speculate whether Nebraska's apportionment under the existing Decree is sufficient to satisfy the competing uses in Nebraska, whether the existing apportionment is no longer equitable, or whether any future use in Wyoming might cause Nebraska substantial harm. For political reasons Nebraska may consider it more convenient for the Court to resolve the intrastate conflict between instream and consumptive uses here. However, the Court should not exercise its original jurisdiction for the mere convenience of a party. *See California v. Nevada,* 447 U.S. 125 (1980). Rather, original jurisdiction is necessarily reserved for addressing only those cases or controversies that meet the strict standards the Court has laid down. *Alabama v. Arizona,* 291 U.S. 286 (1934); *United States v. Nevada,* 412 U.S. 534 (1973).

D. The Relief Nebraska Now Seeks Against Wyoming is Identical to the Relief Sought in Nebraska's First Attempt to Amend Her Petition and Should Be Denied for the Same Reasons the First Amendment Was Denied.

Despite Nebraska's earnest assurance that her second motion to amend is not like her first, which the Court denied, the two bear only cosmetic differences. In her first amended petition, Nebraska requested *modification* or interpretation of the existing Decree to include protection of wildlife habitat as well as irrigation uses. Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree at 4-5, paras. 7, 8 (January 11, 1988). In the second Amended Petition, Nebraska requests an apportionment of non-irrigation season flows for the protection of those same uses. Although the language of the two amended petitions differs, the relief Nebraska would now seek against Wyoming is identical to the relief sought in her first amended petition — to freeze all use of the North Platte River in Wyoming. More importantly, the driving force behind both motions is the same assertion that "all water which currently flows into Nebraska is important to support minimum stream flows for the Platte River." Nebraska Brief at 19.

If the Court accepts Nebraska's Amended Petition, it will embark upon an extremely expensive and time-consuming trial of the factual question of whether, or the extent to which, instream flows in the central Platte River are essential to endangered species and other wildlife habitat at a time when both state and federal administrative proceedings are addressing that same question. To accept Nebraska's Amended Petition also would engage the Court in complex water planning and policy

issues that are better left to the states and the federal regulatory agencies in the first instance. Those are the very issues that this Court avoided by denying Nebraska's first motion for leave to amend. *Nebraska v. Wyoming,* 485 U.S. 931 (1988).

This Court is best suited to function in its role as the appellate court of last resort and not as a trial court for the purpose of trying such complex, technical issues. *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). The Court is also particularly reluctant to take on such factual issues where they may be resolved in other, more appropriate forums. *See Arizona v. New Mexico,* 425 U.S. 794 (1976). Because those issues are being addressed in the context of state and federal administrative proceedings created specifically to deal with them, the Court is justified in declining to take on such complex, factual litigation.

E. The New Allegations of Decree Violations in Count II of Nebraska's Amended Petition are Both Groundless and Untimely.

The relief Nebraska seeks in Count II of the Amended Petition is the same as she seeks in the pending claims — an injunction against potential Wyoming depletions of the river in violation of Nebraska's claimed apportionment under the Decree. Resolution of the pending summary judgment motions should dispose of some, if not all, of Nebraska's new allegations, because those motions address the controlling legal issue — the extent of Nebraska's apportionment under the existing Decree. After the present claims are resolved, any party would be free to seek leave to amend the pleadings or to bring new claims if such claims are properly supported. If that should

happen, the Court's decision interpreting the existing Decree would help focus the issues more sharply.

The claims in Count II of the Amended Petition appear calculated to delay and prejudice resolution of Nebraska's original petition. At the same time, they lack credibility and substance. Had Nebraska been concerned about the matters described in Count II, she would have raised them in her original petition or brought them to Wyoming's attention earlier. Nebraska's statement that she tried to resolve those matters with Wyoming before filing the Amended Petition is false. Nebraska never raised those issues with Wyoming,[18] although doing so might have provided an opportunity to resolve them and avoid needless litigation.

Nebraska seems to believe that the Court would apply a more relaxed standard in determining whether to accept a petition alleging violation of the existing Decree than it would apply to a claim for a new apportionment. In Count II of the Amended Petition, Nebraska tries to create some additional, colorable claims of Decree violations in the hope that the Court would accept the entire Amended Petition under a lesser standard. Even assuming a lesser standard would apply to such claims, the claims in Count II are either patently groundless or too vague to provide a basis for exercise of the Court's original jurisdiction.

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18. The possible exception is that Nebraska registered her opposition to annual water supply contracts entered into between the U.S. Bureau of Reclamation ("USBR") and Pacificorp (formerly Pacific Power & Light) for temporary use of Glendo Reservoir storage. However, Nebraska's Amended Petition is so vague that it is impossible to tell if the USBR/Pacificorp temporary contract is the subject of Count II.

For example, the first of the new allegations asserts a violation of the Decree from operation of a 1945 Wyoming statute which became law even before the Decree was entered. The statute in question confirmed the right of all irrigation water rights then existing to divert up to an additional one cubic foot per second (cfs) per 70 acres from surplus water available after satisfaction of existing rights to one cfs per 70 acres. Act of Feb. 24, 1945, ch. 153, 1945 Wyo. Sess. Laws 189 (effective Feb. 24, 1945) (now codified at Wyo. Stat. §§ 41-4-317 to 41-4-324 (1977)). Nebraska fails to point out that the statute she cites was preceded by another statute that broadly provided for diversions of "surplus water" in excess of one cfs per 70 acres. Act of Feb. 19, 1935, ch. 105, 1935 Wyo. Sess. Laws 154 (amending Wyo. Rev. Stat. § 122-117 (1931) and now codified at Wyo. Stat. § 41-4-317 (1977)). That previous statute was the subject of specific testimony in *Nebraska v. Wyoming (I).* Transcript of Hearings Before Special Master Doherty at 19,454, 21,164, 25,988-25,991. The existence of the surplus water statute and the common practice of diverting more than one cfs per 70 acres in time of high runoff were drawn to Special Master Doherty's attention by Wyoming. Opening Brief of the State of Wyoming Before Special Master Doherty at 181-82. Special Master Doherty in turn expressly held that no limitations on diversion amounts were warranted above Whalen. Doherty Report at 135, 145, 147-48. The Court agreed and adopted Doherty's proposed injunctions tailored to limit irrigated acreage rather than diversions. *Nebraska v. Wyoming,* 325 U.S. 589, 623-24 (1945). Thus, the issue was litigated in the earlier case and there is no justification for Nebraska's attempt to relitigate it nearly 50 years later.

The remaining allegations of Nebraska's Count II are equally without substance. They lack sufficient detail to

enable Wyoming to respond. If any such claims are accepted for filing, Wyoming reserves the right to seek a summary dismissal or other disposal of such claims on the merits.

F. Accepting the Amended Petition Would Cause Undue Prejudice to Wyoming, Colorado and the Other Litigants.

The injection of new claims into the case at this time would "only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky,* 410 U.S. 641, 644 (1973).

Nearly five years ago, the parties joined issue on Nebraska's allegations that Wyoming was violating or threatening to violate Nebraska's apportionment under the Decree. The parties have spent millions of dollars getting the case ready for resolution of those claims. Wyoming has had to postpone construction of a needed municipal water project, Deer Creek Reservoir, during the pendency of this litigation.[19] Wyoming is entitled to a prompt resolution of Nebraska's claim that Deer Creek Reservoir will violate the apportionment under the Decree.

In submitting cross-motions for summary judgment, the states have agreed that the issues of construction of the existing Decree should be determined as a matter of law. The Court will soon receive a recommendation from the Special Master for resolution of the motions.

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19. As Wyoming has pointed out to the Special Master, any further delay works as much to Nebraska's advantage as it works greatly to Wyoming's disadvantage. The cost of construction of Deer Creek Reservoir has risen sharply during the pendency of this litigation.

Wyoming hopes that the Court will decide the controlling questions of law during this term. To now allow new allegations of Decree violations would only delay resolution of the critical Decree interpretation issues that have been pending before the Court for nearly five years. The uncertainty created by Nebraska's pending claims of violation of the Decree is a source of continuing prejudice to Wyoming. Until the pending dispute over construction of the existing Decree is resolved, it is premature to consider reapportionment of the North Platte River.

The admonition of FED.R.CIV.P. 15(a) that leave to amend should "be freely given when justice so requires" must be tempered by the caution with which this Court exercises its original jurisdiction. Even in the lower federal courts, the burden to show that one is entitled to amend is substantially greater when a summary judgment motion is pending. *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979) (party seeking amendment while a summary judgment motion is pending must show affirmatively that the proposed amendment has "substantial merit"); *Carey v. Beans*, 500 F. Supp. 580 (E.D. Pa. 1980), *aff'd* 659 F.2d 1065 (3rd Cir. 1981) ("substantial and convincing evidence supporting the newly asserted claim" is also required). *See also Glesenkamp v. Nationwide Mut. Ins. Co.*, 71 F.R.D. 1, 4 (N.D. Cal. 1974), *aff'd* 540 F.2d 458 (9th Cir. 1976). The vague and unspecified claims tendered in the Amended Petition have not been shown to have substantial merit or the support of convincing evidence. Under such circumstances, a federal district court would have discretion to deny the motion to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). This Court has even

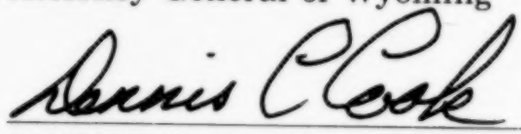
broader discretion to deny the amendment because the tendered claims are inappropriate for litigation in the original jurisdiction.

VI. CONCLUSION.

For the foregoing reasons, the Court should deny Nebraska's Motion for Leave to File Amended Petition.

Respectfully submitted,

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